IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 993 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHANKAR @ SHAKABHAI MAGANBHAI RAVAL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS NITA C BANKER, appointed by Legal Aid Committee for Appellant
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 14/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. A five years old female child was kidnapped from the lawful guardian and thereafter was subjected to sexual abuse by the appellant, Shankar alias Shakabhai Maganbhai Raval, ('the accused' for short). The accused was, therefore, charged and tried by the learned Additional Sessions Judge, 3rd Fast Track Court, Surat, in Sessions Case No. 100 of 2001 for commission of the offences punishable under Sections 363, 366, 376 and 323 of the Indian Penal Code ('IPC' for short).

2. At the end of the trial, the accused was found guilty of the offences with which he was charged and resultantly he was convicted vide judgment and order dated 24.10.2002 and sentenced to suffer R.I. for 12 years and fine of Rs.5,000/- and in default of payment of fine, S.I. for further period of one year for commission of the offence punishable under Section 376 (2) (f) IPC, R.I. for seven years and fine of Rs.5,000/- and in default of payment of fine, S.I. for further period of one year for

commission of offence punishable under Section 363 IPC and S.I. for six months and fine of Rs.500/- and in default of payment of fine, S.I. for further period of one month for commission of the offence punishable under Section 323 IPC whereas no separate sentence is imposed on the accused for commission of the offence punishable under Section 366 IPC. It is also ordered that all the substantive sentences shall run concurrently. It is also clarified that if the amount of fine is not paid by the accused, the sentence of simple imprisonment imposed on the accused shall start running after the main sentence is over.

3. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused has filed this appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short).

4. Briefly stated, the prosecution case is that:

4.1. On 20.12.2000, P.W.1, Gagabhai Sedhabhai

Raval, the complainant, Ex.9, lodged a complaint with Rander Police Station, Surat City, inter alia, alleging that he is staying with his family and is doing the occupation of animal husbandry. The prosecutrix-victim is his second daughter who was aged about five years at the relevant time. The said minor girl, prosecutrix, is hereinafter referred to as 'X' in this judgment. The complainant has given details about his family members in the complaint but to see that the purpose for which we refer the prosecutrix as 'X' in this judgment, for the very same purpose, we are not discussing about the details with regard to the family members of the complainant. His cousin brother, the accused, was residing with him for the last seven months and was doing the animal husbandry at his residence. He was engaged for the said work for a fixed salary of Rs.10,000/- per year. He stayed with the complainant and also took food at the place of the complainant.

4.2. On 19.12.2000, on completion of the work

of animal husbandry, the complainant was sitting in his house at about 8 P.M., after taking dinner. At about 9.30 P.M. the accused brought a cycle and took the five years old daughter of the complainant - X on cycle saying that they will come back after buying cassette. Thereafter the complainant waited for the accused and X till late night but they did not come back. Upon searching them everywhere they were not seen. Thereafter the complainant and his friend Ganeshbhai went to search them in the night with Mansukhbhai. During that period at about 11.15 in the night, the accused was found coming with X on the road between Hidayatnagar and Deepmala society. Upon seeing them, the accused kept X on the ground and threw the cycle and ran away. At that time X was unconscious and they found bite marks on both of her cheeks and neck. He immediately brought X to his house. X started crying in the late night. He and his wife asked her as to why she was crying and at that time she replied to be suffering from pain on the under part and thereby shown urinal part by sign.

Upon removing her clothes when he and his wife saw her private part, it was fully blooded and neck and cheeks were injured. Therefore, when he asked X as to what had happened she stated in her words that the accused took her on cycle forcefully saying that they were going to buy cassette though she did not want to go and he took her to the canal on the cycle and dropped her there from the cycle and made her sit on the ground and removed her underwear and gave her bites on cheeks. He pressed her mouth and slept upon her. Showing urinal part she stated to be suffering from pain. His daughter had gone unconscious. Upon searching the accused he was not found. As it was late night, he could not lodge the complaint on 19.12.2000 and he lodged the complaint the next day i.e., 20.12.2000 and he had also taken his daughter with him to the police station. Therefore, it is alleged in the complaint that the accused has by taking his five year old daughter to the Palanpur Canal on cycle from his house saying that they were going to buy cassette, committed rape on X forcefully in the

darkness and thereby caused her private part fully blooded and gave bites on both cheeks and neck and then ran away.

4.3. The complaint for the aforesaid incident was lodged by the complainant before P.W.14, Dinubhai Viriyabhai Gamit, Ex.43, who, at the relevant time, was working as Police Sub Inspector at Rander Police Station, reduced it into writing and also read over to the complainant and thereafter beneath the complaint, thumb impression of the complainant was obtained. The complaint is produced at Ex.10.

4.4. On the basis of the complaint, P.W.14, Dinubhai Viriyabhai Gamit, Ex.44, registered the offence vide CR No.I-303/2000 at Rander Police Station for commission of the offences punishable under Sections 363, 366, 376 and 323 IPC against the accused and thereafter the investigation was handed over to S.A. Desai, PSI.

4.5. Pursuant to the registration of the

complaint, the investigation was put into motion by P.W.13, S.A. Desai, P.I. Ex.32. He recorded the statement of prosecutrix 'X' and thereafter sent her to Civil Hospital, for medical check up. He also recorded the statements of the witnesses. He prepared the panchnama of the person of the accused on being found and made arrest panchnama also of the accused. The accused also produced the muddamal cycle which was used for commission of the offence and it was recovered in presence of the panchas by drawing a panchnama. Clothes of victim X were also recovered in presence of panchas after drawing a panchnama and the panchnama of the scene of offence was drawn and the blood stained mud as well as control mud was collected under panchnama. The accused was also sent for medical check up to Civil Hospital, Surat. Thereafter all the muddamal recovered during the course of investigation were sent to FSL for chemical analysis and serological report. On receipt of the medical report of the accused and also of X and also the report from FSL, sufficient incriminating evidence was found

against the accused. He, therefore, filed charges-sheet against the accused in the Court of the learned Chief Judicial Magistrate, Surat for commission of the offences punishable under sections 363, 366, 376 and 323 IPC.

4.6. As the offence under section 376 IPC is exclusively triable by a Court of Sessions, the learned Chief Judicial Magistrate, Surat committed the case to the Sessions Court, Surat.

4.7. The learned Additional Sessions Judge, 3rd Fast Track Court, Surat to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Sections 363, 366, 376 and 323 IPC. The charge was read over and explained to the accused. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial and tried by the learned Additional Sessions Judge, 3rd Fast Track Court, Surat in Sessions case No. 100 of 2001.

4.8. In order to bring home the charge levelled against the accused, the prosecution has examined in all 15 witnesses and relied upon their oral testimonies, details of which have been given in paragraph 3 of the impugned judgment and order. They are as under:

P.W. No.	Name	Ex. No.	Page No.
1	Gagabhai Sedhabhai Raval, complainant	9	33
2	X, the prosecutrix	11	40
3	Jerambhai Karansinhbhai Rabari, Panch	12	43
4	Babubhai Bhurabhai Desai, Panch	14	49
5	Madhuben Gagabhai Rabari, mother of the prosecutrix	15	51
6	Ganeshbhai Nathabhai Rabari	16	54
7	Amarbhai Vihabhai, Panch	17	56
8	Mansukhbhai Devjibhai	19	60
9	Panchabhai Haribhai Rabari, Panch	20	62
10	Babubhai Keelabhai	22	66
11	Jerambhai Karamsinhbhai Rabari, Panch	23	68
12	Dr. Shruti Jitendra Manchanda	27	73
13	Sundarbhai Ambalal Desai, P.I. Investigating Officer	32	86
14	Dinubhai Viriyabhai Gamit, Investigating Officer	43	106

P.W. No.	Name	Ex. No.	Page No.
15	Dr. Balubhai Ravjibhai Panchani	44	108

4.9. To prove the culpability of the accused, the prosecution has also produced and relied upon the contends of the following documents, as mentioned in para 4 of the impugned judgment and order:

Sr. No.	Particulars	Ex. No.	Page No.
1	Complaint	10	37
2	Panchnama of scene of offence	13	46
3	Panchnama of recovery of the clothes of the prosecutrix	18	58
4	Panchnama of the recovery of the cycle used by the accused	21	64
5	Panchnama in respect of the physical condition and arrest of the accused	24	70
6	Medical Certificate of prosecutrix	28	78
7	Medical case papers in respect of the prosecutrix	29	80
8	Forwarding letter to FSL	37	93
9	Acknowledgment issued by FSL	38	97
10	FSL report	39	98
11	Serological report	40	104

Sr. No.	Particulars	Ex. No.	Page No.
12	Medical certificate in respect of the accused	46	112

4.10. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against him in the evidence of the prosecution and recorded his further statement as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by saying that he is innocent and he has not committed any offence. He has further stated that in connection with the money transaction between the complainant and the accused, the complainant has falsely implicated him in the rape case. However, he has not led any evidence nor did he examine any witness in support of his defence.

4.11. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the

prosecution, the trial court came to the conclusion that the accused has kidnapped X who was aged about 5 years at the relevant time, from lawful custody of her father without his consent with an oblique motive to commit rape on her. It is also held that with a view to commit sexual intercourse with X, the accused had given biting on both the cheeks of X and also tried to throttle her and caused injuries to her and committed sexual intercourse with her. According to the trial court, the complicity of the accused for commission of the offence punishable under section 376 (2) (f) has been proved. The accused was also found guilty for commission of the offences punishable under sections 363, 366 and 323 IPC. On finding the accused guilty for commission of the said offences, the trial court sentenced the accused to suffer imprisonment to which reference is made in earlier paragraph of this judgment, giving rise to instant appeal at the instance of the accused.

5. Ms. Nita Banker, learned advocate appointed

by Legal Aid Committee for the accused, has contended that the defence of the accused was that he is quite innocent and he has been falsely implicated in the rape case in connection with the dispute of money transaction he had with the complainant, with whom he was serving. She has also contended that the accused and the complainant are cousin and accused was staying with the complainant and serving with him and, therefore, it cannot be believed that such a heinous act can be committed by the accused. The trial court has not considered the said defence. Therefore, according to her, the trial court has committed a serious error in not appreciating the evidence on record in its true perspective. It is also emphasized by her that so far as evidence of X, a minor girl aged about 5 years, is concerned, she has given totally contrary version in the examination-in-chief and in her cross-examination. In cross-examination she has in unequivocal terms stated that the accused has committed no offence nor the accused has committed successful intercourse with her and,

therefore, there is no reason to disbelieve the version of the victim herself.

5.1. Alternatively she has also submitted that if at all the story narrated by the complainant is believed in that case, at the most, the accused can be convicted for the offence of an attempt to commit rape because rape was not completed as there was no penetration at all and, therefore, in that case, the gravity of the offence would be very less and at the most the accused can be convicted for the offence under section 376 (2) (f) read with Section 511 IPC and in that case, the maximum sentence would be one-half of the longest term of imprisonment provided for that offence and for the offence under section 376 (2) (f) the maximums sentence provided is imprisonment for life or imprisonment for not less than 10 years. 'Life imprisonment', as per Section 433A of the Code, means, imprisonment not less than a period of 14 years. The trial court has awarded sentence of R.I. for 12 years and the accused has already

undergone imprisonment for more than six years as per the jail record produced by Mr. K.T. Dave, learned A.P.P. She, therefore, submitted that the impugned judgment and order may be suitably altered by convicting the accused under section 376 (2) (f) read with section 511 IPC and the period of imprisonment already undergone by the accused, which is more than six years, may be treated as substantive sentence and the accused may be set at liberty. It is also urged by her that so far as conviction recorded against the accused for commission of the offences under Sections 363 and 323 IPC is concerned, the same may be upheld. However, the sentence of RI for seven years for commission of the offence under Section 363 IPC may also be reduced to the period of imprisonment undergone by the accused. Therefore, she urged to allow the appeal to the aforesaid extent.

6. Per contra, Mr. KT Dave, learned Addl.P.P. for the respondent – State of Gujarat, has contended that there is reliable, clinching and

trustworthy evidence on record to prove that the accused has committed rape on X who was aged about 5 years at the relevant time. Considering the age of the prosecutrix, slight variation in her version in the examination-in-chief and in cross-examination is not of any significance. Moreover, before the medical officer who examined X and FSL report and also the extra judicial confession of the accused before the medical officer who examined him, are clinching evidence and they are sufficient enough to come to the conclusion that the accused has committed rape upon X and, therefore, the prosecution has proved the charge levelled against the accused beyond reasonable doubt. Looking to the relation between the accused and the complainant, no mercy can be shown towards the accused even by reducing the sentence imposed on the accused. According to him, the appeal is devoid of any merit and deserves to be dismissed. He, therefore, urged to dismiss the appeal.

7. This court has considered the submissions

advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with criminal appeals, this Court has examined the entire evidence on record for itself independently of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence.

8. The charge against the accused is that on 19.12.2000, at about 9.30 P.M. the accused brought a cycle and took the five years old daughter of the complainant - X on cycle saying that they will come back after buying cassettes.

Thereafter the accused took the victim X to the big canal and raped her. During the course of committing rape, he also inflicted injuries to the victim on her both cheeks by biting and in her neck by finger nails.

9. To prove the charge levelled against the accused, the prosecution has examined and relied upon the oral testimony of P.W.1, Gagabhai Sedhabhai Raval, the complainant, Ex.9, page 33 of the paper book. He has inter alia testified that on 19.12.2000, he was sitting at his house after taking dinner at about 8 P.M., on completion of work behind the animals. During that period at about 9.30 P.M. the accused brought a cycle and took his five years old daughter X on cycle saying that they will come back after buying cassettes. Thereafter he waited for the accused and X till late night but they did not come back. Upon searching them everywhere they were not seen. Thereafter he and his friend Ganeshbhai went to search them in the

night with Mansukhbhai. During that period at about 11.15 in the night, the accused was found coming with X on the road between Hidayatnagar and Deepmala society. Upon seeing them, the accused kept X on the ground and threw the cycle and ran away. At that time X was unconscious and they found bite marks on her both cheeks and neck. He immediately brought X to his house. X started crying in the late night. He and his wife asked her as to why she was crying and at that time she replied to be suffering from pain on the under part and thereby shown urinal part by sign. Upon removing her clothes when he and his wife saw her private part, it was fully blooded and neck and cheeks were injured. Therefore, when he asked X as to what had happened and she stated in her words that the accused took her on cycle forcefully saying that they were going to buy cassettes though she did not want to go and he took her to the canal on the cycle and dropped her there from the cycle and made her sit on the ground and removed her underwear and gave her bites on cheeks. He pressed her mouth and slept

upon her. Upon showing urinal part she stated to be suffering from pain. His daughter had gone unconscious. His daughter has stated that the accused had, after removing her undergarments, slept over her.

9.1. In cross-examination made by the learned advocate for the accused, he has admitted that the accused is his maternal cousin and he was staying in his house for the last seven months and was doing labour work. He repelled the suggestion that the accused was not knowing cycling and at the time of the incident he was learning cycling. He also repelled the suggestion that he has not paid salary of Rs.10,000/- for the last one year to the accused and also repelled the suggestion that he was not ready to pay the said amount and the accused has been roped in a false case by him. In sum and substance, he withstood the test of cross-examination.

9.2. On reappraisal of the evidence of P.W.1,

Gagabhai Sedhabhai Raval, according to us, so far as the alleged incident is concerned, there cannot be any dispute. There is no dispute that X was kidnapped by the accused on bicycle, from the lawful guardian of her father.

10. The prosecution thereafter has examined and relied upon the evidence of P.W.2, the prosecutrix X, Ex.11, page 40 of the paper book. It may be noted that she was aged about 6 years at the time of recording her oral testimony and, therefore, the trial court ascertained whether she understands the sanctity of oath and after satisfying that she understands the sanctity of oath, she was given oath and recorded her oral testimony. She has inter alia testified that the accused is her uncle and the accused had taken her on his cycle near the big canal by saying that they are going to take cassette. She refused to accompany him but the accused took her on his cycle. Thereafter he removed her undergarments and gave biting on both her cheeks and also tried to throttle her. She has also

stated that after removing the undergarments, the accused slept on her. Thereafter her father came to take her home. From the big canal to tolnaka she came on the cycle of the accused. She also stated that she has pain on vaginal part. She has also informed the said incident to her father and mother. She has also stated that police has recorded her statement. In her cross-examination by the learned advocate for the accused, she has repelled the suggestion with regard to the dispute regarding the salary between the accused and her father. It is pertinent to note that she has admitted that she was deposing as tutored by her father that her uncle slept on her. She has also admitted that the incident has not taken place.

10.1. At this stage, it may be mentioned that Ms. Banker, learned advocate for the accused, has tried to take advantage of the last two lines of the cross-examination of this witness X but it is not out of place to mention that the victim X was only 6 years old at the

time of recording her oral testimony and, therefore, during cross-examination she might have stated something in favour of the accused who is none other than her uncle without understanding the meaning of the same. However, there is nothing on record which would impeach her evidence stated in the examination-in-chief. She is also very consistent with regard to the incident in question.

10.2. On reappraisal of the aforesaid evidence of X, there is no doubt that the accused has kidnapped the prosecutrix and gave bitting on her cheeks and tried to throttle her also made an attempt to commit rape upon her.

11. In light of the evidence on record, now the question that calls for determination of this court, therefore, is as to whether the act of the accused is 'rape' or an 'attempt to commit rape'.

12. In this connection, it would be

appropriate to advert to the evidence of P.W.12, Dr. Shruti Jitendra Manchanda, Ex.27, page 73 of the paper book. She was Assistant Professor in New Civil Hospital, Surat at the relevant time. She has, inter alia, testified that on 20.12.2000, X was brought to her for medical check up by her father. She found blood stains on the undergarment of the prosecutrix. On examination, she found the following injuries:

(1) Human bite marks on both cheeks, One on each side.

(2) Multiple nail mark on anterior part of neck. One nail mark deep and larger without scab formation (on left side).

(3) A perineal tear of about 0.5 cm on forchette, no tender and on left labia minor.

No active bleeding. 1 Swab taken from interior for spermatozoa. Hymen torn – multiple small tender tears noted – No active bleeding. The medical certificate issued by her is produced at Ex.29.

12.1. She has also stated that there was no

spermatozoa seen. She has also testified that the history was given by her father.

12.2. In cross-examination, an attempt was made that while taking the victim by the accused on bicycle she fell down and therefore the handle-bar of the bicycle dashed with the vagina and as a result of that, injury was found in the vagina. It is pertinent to note that in the cross-examination she has admitted that X was 5 years old and, therefore, it was difficult to insert even the little finger into her vagina. She has also admitted that no spermatozoa was found in the smear. She has also admitted that even penetration of little finger in the vagina is difficult.

12.3. From the aforesaid evidence of Dr. Shruti, it is very difficult to come to the conclusion that there was penetration of penis of the accused in the vagina of X. Attempt must have been made by the accused but looking to the age of X which was five years, it was impossible for

the accused to penetrate his penis in the vagina of X. Therefore, according to us, the said act is an attempt to commit rape by the accused.

13. We are fortified in reaching to the aforesaid conclusion by the evidence of P.W.15, Dr. Balubhai Ravjibhai Panchani, Ex.44, page 108 of the paper book, who was a Medical Officer, Civil Hospital, Surat at the relevant time. This witness had examined the accused. He has inter alia testified that the accused confessed before him of forceful intercourse tried at about 8 P.M. on 19.12.2000 on Chakku i.e., (niece). The said history was narrated by the accused himself before the doctor when he was brought with Police Yadi. The accused had also given the history of accidental injury due to fall from the cycle on cactus. During the examination, the doctor found multiple scratches over left forearm, left knee joint and abdomen, red colour. However, no hydrocole and no hernia was noticed. Secondary sex characters well developed. No injury was found on external genetilia. Smegmar not present.

There was no sign that he cannot perform intercourse. The medical certificate issued by him is at Ex.46.

14. On reappraisal of the evidence of P.W.15, Dr. Balubhai Ravjibhai Panchani, Ex.44, it has to be held that the act of the accused was not an offence of rape but it was only an attempt to commit rape after kidnapping X.

15. What is 'rape' and what is an 'attempt to commit rape' has been succinctly explained by the Supreme Court in the case of Madan Lal v. State of Jammu and Kashmir, AIR 1998 SC 386. While explaining the said aspect, in paras 11 and 12 of the judgment, the Supreme court has observed as under:

> “The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of

an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the round undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it cannot be said that it was a case of merely assault under section 354 IPC and not an attempt to commit rape under section 376 read with 511 IPC. In the facts and circumstances of the case the offence of an attempt to commit rape by accused has been clearly established and the accused was rightly convicted under section 376 read with 511 IPC.

16. A similar question arose before the Supreme court in the case of Koppula Venkat Rao v. State of A.P., (2004) 3 SCC 602. It would be appropriate to refer to Head Notes (C) of the

said reported judgment, which reads as under:

> “C. Penal Code, 1860 – S. 511 - “Attempt” to commit crime – Meaning – When does the said attempt commence - “attempt” to commit crime distinguished from “intention” to commit crime and “preparation” to commit crime.
>
> Held:
>
> In every crime, there is firstly, an intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it. Thus, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence.
>
> An attempt to commit an offence is an act, or series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt

may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.

Thus, an attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence.

An attempt to commit a crime is to be

distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offence under Section 122 IPC (waging war against the Government of India) and section 399 IPC (preparation to commit dacoity). The dividing line between a mere preparation and an

> attempt is something thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation. The illustrations given in section 511 clearly show the legislative intention to make a difference between the case of a mere preparation and an attempt."

The Supreme court has also explained as to why an "attempt to commit an offence" was made punishable. Under head Note D, in the above referred to reported judgment, it has been observed as under:

> "D. Section 511 makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of

the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded".

17. Applying the principles laid down by the Supreme Court in the above referred to judgments to the facts of the present case coupled with the evidence of both the doctors, i.e., P.W.12, Dr. Shruti Jitendra Manchanda, Ex.27, who examined the victim X and P.W.15, Balubhai Ravjibhai Panchani, Ex.44, who examined the accused, it is seen that there is evidence to the effect that spermatozoa was not seen in the smear. There was multiple small tender tears injuries but there was no active bleeding on the vagina of X as well as there was no injury on the external genital of the accused and smegmar not present on the penis of the accused. The accused has also admitted before the doctor that forceful

intercourse was tried, which is an evidence of extra judicial confession made by the accused before the doctor, and considering the evidence of of the prosecutrix X in its proper perspective it is clear that the commission of actual rape has not been established. However, evidence is sufficient to prove that attempt to commit rape was made. This being the position, commission of the offence under section 376 (2)(f) is required to be altered to an offence under section 376 (2) (f) read with section 511 IPC.

18. So far as the offence punishable under Section 376 (2)(f) IPC, the trial court has imposed RI for 12 years which is required to be altered to one under section 376 (2) (f) read with Section 511 IPC. As per section 511, the accused shall be punished for one-half of the longest term of imprisonment provided for that offence.

19. It has come in the evidence that the accused

is in jail for more than six years and, therefore, according to us, the custodial sentence of more than six years would meet the ends of justice for commission of offence under section 376 (2) (f) read with section 511 IPC.

20. This takes us to examine whether the offence of 363 has been established or not. In this connection, as discussed in earlier paragraphs of this judgment, there is ample evidence that X was aged less than six years and the accused took her from her lawful guardian by carrying her on bicycle without consent of her father and took her to the big canal and thereafter attempted to commit rape and, therefore, offence under Section 363 IPC has been duly established.

21. Similarly, in view of the evidence of the P.W.12, Dr. Shruti Jitendra Manchanda, Ex.27, and the medical certificate Ex.28, page 78 of the paper book, there were biting marks on both

cheeks of the prosecutrix as well as nail marks on the neck of the prosecutrix. Therefore, offence of voluntarily causing hurt to her is established and thus offence under section 323 IPC is also established against the accused.

22. So far as the offence of under Section 323 IPC is concerned, the trial court has imposed punishment of SI for six months whereas for the commission of offence under section 363 IPC the trial court has imposed RI for seven years. Therefore, while upholding the conviction under sections 323 and 363, according to us, custodial sentence of more than six years undergone by the accused also would meet the ends of justice for the commission of offence under section 363 IPC.

23. Seen in the above context, while upholding conviction under sections 363, 366 and 323 IPC the conviction under section 376 (2) (f) is required to be altered to one under section 376 (2) (f) read with section 511 IPC and the

custodial sentence of more than six years undergone by the accused is required to be treated as substantive sentence for all the offences.

24. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. While upholding the conviction under Sections 363, 366 and 323 IPC, we alter the conviction under section 376 (2) (f) IPC to section 376 (2) (f) read with section 511 IPC. The custodial sentence of more than six years undergone by the accused is treated as substantive sentence for all the offences. The accused is in jail. Therefore, the jail authorities are directed to set the accused at liberty forthwith if he is not required in connection with any other case.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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(karan)